FILED
APR 10 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1247

SYLVESTER K. STEVENS,

Petitioner,

—against—

HELEN C. FRICK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIMON H. RIFKIND
Attorney for Petitioner
575 Madison Avenue
New York, New York 10022

JOSEPH H. EINSTEIN
IRA B. SHEPARD
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
of Counsel

INDEX

	PAGE
The Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	5
Statement of the Case	6
Preliminary Statement	6
The Facts	8
Reasons for Granting the Writ of Certiorari	13
Conclusion	20
Appendices:	
Appendix A—Judgment of the Court of Appeals	23
Appendix B—Opinion of the Court of Appeals	25

TABLE OF AUTHORITIES

Cases

PAGE

AFL v. *Swing*, 312 U.S. 321 (1941) 14
American Optometric Ass'n v. *Ritholz*, 101 F.2d 883 (10th Cir.), *cert. denied*, 307 U.S. 647 (1939) 17
Ashton v. *Kentucky*, 384 U.S. 195 (1966) 14, 20

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 17
Baines v. *City of Danville*, 337 F.2d 579 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965) 17
Bond v. *Floyd*, 385 U.S. 116 (1966) 18
Brandreth v. *Lance*, 8 Paige 24 (N.Y. Ch. 1839) 13
Bridges v. *California*, 314 U.S. 252 (1941) 13
Browder v. *Gayle*, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956) 17

Cameron v. *Johnson*, 381 U.S. 741 (1965) 19
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 13
Cooper v. *Hutchinson*, 184 F.2d 119 (3rd Cir. 1950) .. 19
Crosby v. *Bradstreet Co.*, 312 F.2d 483 (2d Cir.), *cert. denied*, 373 U.S. 911 (1963) 13

Dilworth v. *Reiner*, 343 F.2d 226 (5th Cir. 1965) 19
Dombrowski v. *Pfister*, 380 U.S. 479 (1965), 2, 7-8, 12, 14, 15, 19, 20

Frick v. *Boyd*, 214 N.E.2d 460 (Sup. Jud. Ct. Mass. 1966) 12

Garrison v. *Louisiana*, 379 U.S. 64 (1964) 14
Goss v. *Illinois*, 312 F.2d 257 (7th Cir. 1963) 19
Grosjean v. *American Press Co., Inc.*, 297 U.S. 233 (1936) 13
Kuhn v. *Warner Bros. Pictures*, 29 F. Supp. 800 (S.D. N.Y. 1939) 13

PAGE

League for Peace, Inc. v. *Newspaper P.M., Inc.*, 188 Misc. 317, 65 N.Y.S.2d 480 (Sup. Ct. 1946) 13

Lovell v. *City of Griffin*, 303 U.S. 444 (1938) 13

Mills v. *Alabama*, 384 U.S. 214 (1966) 14, 20

NAACP v. *Button*, 371 U.S. 415 (1963) 14, 20

Near v. *Minnesota*, 283 U.S. 697 (1931) 13

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964), 13, 14, 19

Sexton v. *Barry*, 233 F.2d 220 (6th Cir. 1956) 20

Shelley v. *Kraemer*, 334 U.S. 1 (1948) 19

Smith v. *Apple*, 264 U.S. 274 (1924) 17

Time, Inc. v. *Hill*, 35 U.S.L. WEEK 4108 (January 9, 1967) 14

Washington Post Co. v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 87 S. Ct. 708 (1967) ...8, 15

Wells Fargo & Co. v. *Taylor*, 254 U.S. 175 (1920) 17

Willis v. *O'Connell*, 231 Fed. 1004 (S.D. Ala. 1916) .. 13

Wolff v. *Selective Service Local Board No. 16*, No. 30783, 2d Cir., January 30, 1967 .....3, 17, 18

Constitution and Statutes

U.S. Constitution, First Amendment .....*passim*

U.S. Constitution, Fourteenth Amendment 5, 10

28 U.S.C. § 1331(a) 4, 5, 12

28 U.S.C. § 1343(3) and (4) 4, 5-6, 13, 16

28 U.S.C. § 2283 .....2, 3, 4, 6, 15, 16, 17, 18, 19

42 U.S.C. § 1981 *et seq.* 13

42 U.S.C. § 1983 (Civil Rights Act of 1871), 2, 4, 6, 13, 16, 18, 19

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No.

SYLVESTER K. STEVENS,

Petitioner,

—against—

HELEN C. FRICK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Sylvester K. Stevens, respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to review the judgment of that Court dated February 1, 1967 (Appendix A hereto) which affirmed the judgment and order of the United States District Court for the Southern District of New York in favor of respondent, Helen C. Frick, dismissing petitioner's complaint and denying his motion for a preliminary injunction.

The Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at — F.2d — and reprinted as Appendix B hereto.

The opinion of the District Court is reported at 259 F. Supp. 654. The judgment, order and opinion of the

District Court are reprinted at pages 4a-12a of the petitioner's Appendix in the Court of Appeals, nine copies of which are submitted herewith pursuant to Rule 21(4) of this Court.*

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 1, 1967. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

This case presents critical questions concerning the substantive and procedural breadth of the First Amendment right of freedom of the press. It brings before this Court important issues of widespread significance in the area of the free exercise of First Amendment rights.

For example, in *Dombrowski* v. *Pfister*, 380 U.S. 479, 484 n. 2 (1965) this Court left open for future resolution the conflict among the Courts of Appeals as to whether injunctive relief against unwarranted intrusions upon First Amendment rights through state judicial proceedings could be granted by the federal courts under the Civil Rights Act of 1871 (42 U.S.C. § 1983) as an exception to the anti-injunction statute (28 U.S.C. § 2283). That issue is ripe for determination in this case.

A related issue—also here presented—is whether the participation of the state through its judicial officers in the challenged invasion of First Amendment rights constitutes "state action" under the Civil Rights statute.

---

* All record references in the form of page numbers followed by "a" are to the Court of Appeals Appendix; those references in the form of page numbers followed by "b" are to the Court of Appeals Supplemental Appendix. Those references preceded by the letter "R" are to the certified record on appeal.

Further, the present case brings with it for decision the issue of whether the anti-injunction rule of 2283 must yield to the imperative recognition of constitutional rights of paramount importance such as those granted by the First Amendment when the state proceedings are of themselves the instruments of invasion. The decisions of the Supreme Court and of the Court of Appeals for the Fourth Circuit appear to require 2283 to yield so that the Constitution may have the right of way. Yet, the Second Circuit panel which heard this case rejected such a principle. Significantly, in *Wolff* v. *Selective Service Local Board No. 16,* No. 30783, 2d Cir., January 30, 1967, a different panel of the same Court of Appeals for the Second Circuit rendered a decision which points to the opposite result.

At issue here are the power and duty of the federal courts to halt a clear, present and highly injurious invasion of the First Amendment right of freedom of the press mounted and propelled by means of a state court litigation, inaugurated and sustained by respondent, Helen Clay Frick, with the cooperation of the authorities, executive and judicial, of the Commonwealth of Pennsylvania. By that action, petitioner is threatened with an order either prohibiting distribution of his scholarly historical work altogether or forcing him to recant certain statements. These are the sole objects of the state suit. This relief is sought solely on the ground that three brief passages in petitioner's book, *Pennsylvania: Birthplace of a Nation,* are defamatory of plaintiff's father, Henry Clay Frick. Mr. Frick died in 1919. Thus far, the federal courts have refused to call a halt to the state inquisition. Meantime, the action has been used as a menace to obstruct distribution of the book.

The questions presented and upon which a writ of certiorari is requested are:

1. Does the First Amendment permit the issuance of

an injunction forbidding distribution of a scholarly work of history, or requiring its author to recant statements made in the book on the ground that the book is derogatory of plaintiff's famous father who died fifty years ago, the plaintiff herself not even being mentioned in the text?

2. Does the First Amendment tolerate the pendency of an action seeking only such relief?

3. Do the federal courts, under their general jurisdiction in cases involving constitutional questions (28 U.S.C. § 1331 [a]) and in cases brought "to redress the deprivation, under color of state law . . . of any right . . . secured by the Constitution of the United States" (28 U.S.C. § 1343 [3]) have jurisdiction of an action brought to enjoin further prosecution of a protracted state court proceeding in which First Amendment rights are in jeopardy and the very pendency of which is a restraint upon or destruction of those rights?

4. The petitioner having been haled by a state official—to wit, a sheriff—before a judicial officer of the state, holding court in state facilities, and compelled to answer a suit, the mere pendency of which is a burden on the exercise of First Amendment rights, has he been subjected to forbidden action taken "under color of any statute, ordinance, regulation, custom, or usage of any State. . . ." so as to allow him to invoke federal jurisdiction under the Civil Rights Act of 1871 (42 U.S.C. § 1983) and 28 U.S.C. § 1343 (4)?

5. Does 28 U.S.C. § 2283 forbid the issuance of an injunction against further prosecution of a pending state court action where important constitutional rights are suffering serious and irreparable invasion because of the mere pendency of that action?

6. Does the Civil Rights Act of 1871 authorize such injunctive relief and is an action brought pursuant to that statute an "expressly authorized" exception to § 2283?

7. Is it an abuse of discretion for a federal court to refuse to enjoin a protracted state proceeding seeking relief which the Constitution forbids, the mere pendency of which is an interference with and burden upon the freedom of the press, simply because of the speculative hope that the state court or this Court may ultimately and at some indeterminate future time grant petitioner the dismissal to which he is constitutionally entitled?

Constitutional and Statutory Provisions Involved

United States Constitution, First Amendment

> "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

United States Constitution, Fourteenth Amendment

> ". . . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

28 U.S.C. § 1331(a)

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest or costs, and arises under the Constitution, laws or treaties of the United States."

28 U.S.C. § 1343(3)(4)

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * *
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by

the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. § 1983 (Civil Rights Act of 1871)

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 2283

"A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Statement of the Case

Preliminary Statement

This case presents the critical issue whether the federal judiciary is compelled to sit idly by while sensitive First Amendment rights are put in jeopardy and their exercise immediately obstructed by a state court, or can take judicial action to protect those who are deprived of their right to freedom of the press.

The very necessary action that petitioner sought from the federal courts in this case was to enjoin the combined action of the defendant and the State of Pennsylvania, the object of which is to suppress a serious work of historical scholarship, by means of a judicial proceeding, the very pendency of which is, and is used as, a deterrent to the exercise of the First Amendment rights associated with freedom of the press.

The executive branch of the State of Pennsylvania haled Dr. Stevens before its judiciary in Cumberland County. He was ordered to attend before a judge of the state court of Pennsylvania which subjected him to questioning and now threatens to suppress his book, *Pennsylvania: Birthplace of a Nation.**

All this the State of Pennsylvania has done in response to a suit in equity commenced by Miss Frick in which the sole relief requested is the suppression of the book, because, according to Miss Frick, it is derogatory of her deceased father. Miss Frick has stated that, as an alternative, she will accept an order directing Dr. Stevens to recant by signing a list of *errata.*

The menace inherent in the pendency of the Pennsylvania suit is the cloud which it places over distribution of Dr. Stevens' book. Miss Frick's agents have used the pending state proceeding as a basis for threatening those who desired to distribute the book.

In *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), this Court declared:

> ". . . we have, in effect, avoided making vindication of the freedom of expression await the outcome of protracted litigation. Moreover, we have not thought

* Nine copies of Dr. Stevens' book (R 1 through R 400) are submitted herewith.

> that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." (380 U.S. at 487).

Accord, *Washington Post Co.* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 87 S. Ct. 708 (1967).

The District Court and the Second Circuit failed to apply this transcendent constitutional principle. They not only denied Dr. Stevens' motion for an injunction *pendente lite* to restrain further prosecution of the Pennsylvania action but also dismissed his federal action.

Dr. Stevens here asks that this Court grant review of the judgment below, reverse and direct the entry of the injunction prayed for. Vigilant protection of First Amendment rights so requires.

The Facts

The salient operative facts are relatively simple, generally undisputed, and are as follows:

In December 1964, three years of work (and a lifetime of study) by petitioner, Dr. Sylvester K. Stevens (a well known and respected historian) (30a), culminated in the publication, through Random House, of a 400-page one-volume general history of Pennsylvania entitled, *Pennsylvania: Birthplace of a Nation* (30a-31a). This book was well received by reviewers (30a, 42a-55a), was the subject of a congratulatory resolution by the Pennsylvania Senate (30a-31a, 56a-57a) and won an Award of Merit bestowed by the American Association for State & Local History (30a).

Seven hundred persons—some living, but most now dead—are mentioned in the course of this book. Among

them is the Pittsburgh industrialist Henry Clay Frick, who died in 1919. He was the father of respondent, Helen Clay Frick. He is mentioned seven times (31a).

Miss Frick apparently received a copy of the book as a 1964 Christmas gift. She read the passages concerning her father and three of them were not to her liking (31a).

After complaining to Dr. Stevens, Miss Frick commenced a suit in equity, in the Court of Common Pleas of Cumberland County, Pennsylvania (31a-32a). A deputy sheriff of Cumberland County summoned Dr. Stevens into court (32a).

The complaint in the Pennsylvania suit is in equity. It seeks no money damages. Instead, the complaint demands an injunction against the sale and distribution of the book (15a-20a). As an alternative, Miss Frick has stated, she is willing to have the Pennsylvania court direct Dr. Stevens to sign a list of *errata* (74a-75a). Thus, Miss Frick seeks state suppression, or in the alternative, state censorship of Dr. Stevens' book.

No claim is made that the book contains any defamatory matter concerning Miss Frick (15a-20a, 33a). She is not even mentioned in the book (33a). (She does claim that anything uncomplimentary written of her father reflects adversely on her) (33a). Her basic allegation is that her father, who has been dead for almost fifty years, is defamed.

The three passages which Miss Frick asserts are untrue and defamatory of her father are:

1. "The Rev. George Hodges arrived in Pittsburgh in 1881 to become pastor of the Calvary Ascension Church attended by Henry Clay Frick and more Pittsburgh tycoons than any other single Pittsburgh

church. Unshaken by this array of wealth in his church, not all of which had been amassed in exact accord with what many regarded as Christian principles and practices, Mr. Hodges preached and acted as an apostle of social reform." (17a).

2. "In the bituminous fields of western Pennsylvania Henry Clay Frick had built a similar monopoly of coal and coke production and was equally successful in beating down efforts at unionization. Frick also made extensive use of immigrant labor and cut wages to an average of about $1.60 a day while extracting the longest hours of work physically possible. Most mines of the time were without anything resembling modern safety appliances or practices and serious accidents were common.

   "Still another abuse was the company town with its company store. The coal companies owned the houses, shoddy wooden shacks without sanitary facilities, which they rented at a high price to workers." (18a).

3. "The power of the union was broken in the bloody and disastrous Homestead strike in 1892 by stern, brusque, autocratic Henry Clay Frick." (18a).

Significantly, the judgments of Dr. Stevens about Henry Clay Frick are far milder than those of many other noted and respected historians (1b-5b).

Dr. Stevens moved in the Pennsylvania action to dismiss the suit on the ground that it violated constitutional rights of free press as guaranteed by the First and Fourteenth Amendments (34a, 63a).

The Pennsylvania court refused to grant the motion and then proceeded to a consideration of the action on the merits (34a, 63a).

Dr. Stevens' defense was based on a demonstration of the accuracy of what he had written (35a). To prove the relevant facts Dr. Stevens' counsel attempted to introduce three categories of evidence: (a) the oral testimony of historians as to their research about Henry Clay Frick, (b) secondary sources—respected historical writings on the subjects in issue and (c) contemporaneous newspaper accounts and other materials in the nature of so-called primary source materials (35a).

The Pennsylvania court took a most restrictive view of what was admissible to prove the propriety of what Dr. Stevens had written concerning Henry Clay Frick (35a-38a). Basically, the trial judge limited proof to eye-witnesses and "disinterested" primary sources (64a-70a). Thus, the court refused to consider much material of the kind historians generally use in their work. In so doing the trial judge made value judgments which only trained professional historians—not lawyers—can make intelligently and which judges are not authorized to make.

If, in order to avoid litigation of the kind commenced by Miss Frick, historians had to explore the past with only the tools afforded by the trial judge's rulings, history as we know it would cease to be written.

Miss Frick's use of the pending Pennsylvania action to aid her attempts to suppress Dr. Stevens' historical writing is documented by an event which took place in August 1965. At that time Mr. Buerger, Miss Frick's attorney, wrote a letter in her behalf to the Historical Foundation of Pennsylvania in which he advised of the pendency of the Pennsylvania suit, referred to the Foundation's tax-exempt status and threatened direct action against that tax status and to sue the Foundation for libel if it went ahead with plans to distribute 2,000 copies of Dr. Stevens' book to school and community libraries in Pennsylvania (34a, 61a-62a).

The Foundation did not go through with its plans, for the asserted reason that it could not afford to do so. How many foundations could afford to face so formidable a threat!*

In July 1966 Dr. Stevens sought the aid of the federal courts in order to put an end to Miss Frick's excursion in censorship and commenced the present action in order to achieve the result which the First Amendment mandates and which the state tribunal should have granted without ceremony—a prompt termination of the state litigation. Thus far, however, the federal courts have yielded in favor of further protracted proceedings in Pennsylvania where Miss Frick's suit remains *sub judice* before the court of Common Pleas; they have allowed "vindication of the freedom of expression [to] await the outcome of protracted litigation." *Dombrowski* v. *Pfister, supra,* at 487.

So grave a threat is, in the opinion of historians, posed by the Pennsylvania action to their freedom to write history that the American Historical Association and the Organization of American Historians have, in response, created a Joint Committee for the Defense of Rights of Historians Under the First Amendment. This Committee was organized to oppose censorship activities such as those initiated by Miss Frick (83a-84a). It has assisted in the prosecution of this federal action.

Dr. Stevens' assertion of jurisdiction in the courts below was founded upon at least two grounds: the presence of a constitutional question (with over $10,000 in controversy) (28 U.S.C. § 1331[a]) and a claim of deprivation of rights

---

* See *Frick* v. *Boyd,* 214 N.E.2d 460 (Sup. Jud. Ct. Mass. 1966) for a similar, but there unsuccessful, excursion by Miss Frick against an 87-year-old social worker.

"under color of law" cognizable under the Civil Rights Act of 1871 (42 U.S.C. § 1981 *et seq.*, especially § 1983) and 28 U.S.C. § 1343 (3) and (4) (the enabling statute to the Civil Rights Act).

Reasons for Granting the Writ of Certiorari

There ought to be little doubt that Miss Frick can never be granted the final relief she seeks in the state action.

Injunctions against the written word, based on a claim that what was written was defamatory, were unknown at common law and are completely barred by the First Amendment, which is applicable to the states through the Fourteenth Amendment. See *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233 (1936); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Crosby* v. *Bradstreet Co.*, 312 F.2d 483 (2d Cir.), *cert. denied*, 373 U.S. 911 (1963); *Willis* v. *O'Connell*, 231 Fed. 1004 (S.D. Ala. 1916); *Kuhn* v. *Warner Bros. Pictures*, 29 F. Supp. 800 (S.D.N.Y. 1939); *Brandreth* v. *Lance*, 8 Paige 24 (N.Y. Ch. 1839); *League for Peace, Inc.* v. *Newspaper P.M., Inc.*, 188 Misc. 317, 65 N.Y.S.2d 480 (Sup. Ct. 1946). Nor can Miss Frick force Dr. Stevens to recant by signing a list of *errata* retracting the statements which Miss Frick finds displeasing to her.*

---

* Further, Miss Frick's Pennsylvania litigation raises several additional problems of serious constitutional dimensions:

First, a serious problem arises under the doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) inasmuch as Henry Clay Frick was—and is in history—a prominent figure.

Second, Miss Frick grounds her claim not on a libel of herself but on a claim that Dr. Stevens defamed her dead ancestor. Such suits were unknown at common law and we seriously doubt that the Constitution will tolerate more than the common law of libel. See, *Bridges* v. *California*, 314 U.S. 252 (1941).

Thus, the central questions raised in this litigation and here presented to this Court are whether the federal courts, with their vaunted solicitude for our cherished First Amendment rights, will intervene and halt the costly charade; or whether Dr. Stevens will be compelled to suffer through the agonies and expenses of protracted Pennsylvania trial court proceedings and state appeals, bear the risk of an adverse decision in the state courts and fine and imprisonment for contempt, in the meantime have his book suffer under the cloud of the pending litigation, before the author is finally relegated to seek relief from this Court several years hence.

There can be no doubt of the paramount place of the First Amendment rights of free speech and free press in the catalogue of constitutional values. A long line of decisions has established this principle beyond challenge. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Time, Inc.* v. *Hill*, 35 U.S.L. WEEK 4108 (January 9, 1967).

These rights are guarded with "a jealous eye." *AFL* v. *Swing*, 312 U.S. 321 (1941).

This Court has time and again declared that not only a direct interference with First Amendment rights, but any activity which inhibits their free exercise or which has a "chilling effect" transgresses the bounds of the Constitution. *NAACP* v. *Button*, 371 U.S. 415 (1963); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Mills* v. *Alabama*, 384 U.S. 214, 221-22 (1966) (concurring opinion); *Ashton* v. *Kentucky*, 384 U.S. 195 (1966).

This Court has mandated that any activities which have that forbidden effect must be halted promptly and summarily. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). In *Dombrowski* this Court expressly rejected a contention, such as adopted by the courts below, that vindication of

First Amendment rights could await the outcome of protracted state court proceedings, noting:

> ". . . [A] substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. . . .
>
> ". . . The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett* v. *Bullitt*, supra, at 379. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . .' *NAACP* v. *Button*, 371 U.S. 415, 433. . . . [W]e have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure. See *NAACP* v. *Button, supra*, at 432-433; cf. *Baggett* v. *Bullitt, supra*, at 378-379; *Bush* v. *Orleans School Board*, 194 F. Supp. 182, 185, affirmed *sub nom. Tugwell* v. *Bush*, 367 U.S. 907; *Gremillion* v. *United States*, 368 U.S. 11." (380 U.S. at 486-87).

Accord, *Washington Post Co.* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 87 S. Ct. 708 (1967).

These transcendent constitutional principles were ignored by the courts below.

The courts below concluded that Dr. Stevens' federal action must be dismissed because (a) the anti-injunction statute, 28 U.S.C. § 2283, was an absolute bar to the relief petitioner sought, (b) he showed no "state action" and

hence petitioner failed to state a cognizable claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and implementing law, 28 U.S.C. 1343, (c) even assuming a cause of action under the Civil Rights Act of 1871, such was of no help to petitioner because that Act was not an expressly authorized exception to 28 U.S.C. § 2283, and (d) in any event, petitioner must await the outcome of the protracted state proceedings.

We respectfully submit that each of these four asserted bases for dismissal is pregnant with error. They are not supported by reason, logic, the decisions of this Court or the constitutional realities presented by this case. Each asserted reason enfolds pressing issues which should be resolved by this Court.

A.

The courts below held that 28 U.S.C. § 2283 was an insurmountable obstacle to the granting of any relief. This holding, we respectfully submit was in error and should be reviewed by this Court. If the courts below are correct, then no state court invasion of protected constitutional rights can be prevented at its inception, but only after the invasion has ripened into a final judgment, appealable to this Court.

We argued in the courts below that § 2283 is a codification of the judicial doctrine of comity which yields in cases of compelling constitutional necessity. Our argument was based upon decisions construing the statute itself and applying the judge-made rule of comity which we believed clearly indicated that the doctrine was one of equitable discretion and that the bar which comity erects to federal interference in state matters (be it a bar imposed by decision or by statute) must yield when necessary to give full protection against erosion of perishable constitu-

tional freedoms. See *Wells Fargo & Co.* v. *Taylor,* 254 U.S. 175 (1920); *Smith* v. *Apple,* 264 U.S. 274 (1924); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Baines* v. *City of Danville,* 337 F.2d 579 (4th Cir. 1964), *cert. denied,* 381 U.S. 939 (1965); *American Optometric Ass'n* v. *Ritholz,* 101 F.2d 883 (10th Cir.), *cert. denied,* 307 U.S. 647 (1939); *Browder* v. *Gayle,* 142 F. Supp. 707 (M.D. Ala.) (three judge court), *aff'd per curiam,* 352 U.S. 903 (1956).

As noted in *Browder,* the doctrine of abstention "has no application where the plaintiffs complain they are being deprived of constitutional civil rights. . . ." (142 F. Supp. at 713).

The Court of Appeals for Second Circuit, in affirming and in rejecting our argument, noted that: "We do not believe that Section 2283 is so limited." (Appendix B, p. 31, *infra*). This conclusion that 2283 is an absolute bar is in direct conflict with that reached by the Fourth Circuit in *Baines* v. *City of Danville, supra,* and appears to be an unwarranted and constitutionally injurious departure from the principles laid down by this Court in the cases cited above.

Moreover, the Second Circuit ruling in this case conflicts in principle with that of a different panel of judges drawn from the same Court made in *Wolff* v. *Selective Service Local Board No. 16,* No. 30783, 2d Cir., January 30, 1967. In *Wolff,* the plaintiffs had been reclassified from II-A to I-A because of their participation in demonstrations protesting American involvement in Viet Nam. They sued challenging the reclassification.

The Selective Service Board sought to dismiss for lack of a justiciable controversy because the plaintiffs had not demonstrated injury as they had not as yet been drafted or refused to report for an induction and hence subjected to criminal prosecution. The District Court granted the mo-

tion to dismiss but the Court of Appeals, relying on *Dombrowski,* reversed, noting:

> "Here it is not relevant whether or not appellants will ever be inducted. The effect of the reclassification itself is immediately to curtail the exercise of First Amendment rights, for there can be no doubt that the threat of receiving a I-A classification upon voicing dissent from our national policy has an immediate impact on the behavior of appellants and others similarly situated.
>
> "It has been held repeatedly that the mere threat of imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly and the right to vote. . . . Since it is the mere threat of unconstitutional sanctions which precipitates the injury, the courts must intervene at once to vindicate the threatened liberties." (Slip opinion at 1095-96)

The court in *Wolff* (noting this Court's decision in *Bond* v. *Floyd,* 385 U.S. 116 [1966]) clearly recognized its obligation "to intervene in areas normally left to other branches of government, when the free exercise of First Amendment guarantees is jeopardized." (*Wolff, supra,* slip opinion at 1098 n. 4).

This healthy exception to the rule of 2283—an exception required if paramount constitutional rights are to be protected—the courts below failed to recognize and apply. Their failure to do so presents a pressing reason for review; especially in light of this Court's opinion in *Dombrowski.*

B.

Both the District Court and the Court of Appeals held that Dr. Stevens had not stated a cognizable claim under the Civil Rights Act of 1871 because, in their opinion,

there was no "state action". Yet petitioner set forth a classical case of judicial and executive interference with constitutionally protected rights as defined by this Court in the landmark case of *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). See also, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 at 265 (1964).

Dr. Stevens was brought into court by service of process by a state official. The coercive power of the state compelled him to participate in proceedings in a state courthouse before a state judge. The power of the state—right down to confinement in the state jail-house for contempt—looms over him in every phase of the Pennsylvania litigation. It is inconceivable that "state action" is not present here. Yet, in a dangerous and precedent-breaking decision, the courts below so held.

By failing to recognize the claim of Dr. Stevens for relief under the Civil Rights Act, the courts below removed from the sphere of federal judicial protection an area of possible abuse of civil rights—that of abuse by unwarranted suits in state courts. Such an exemption was not, we respectfully submit, intended by the framers of the Civil Rights Act. Indeed, *Dombrowski* very clearly points the way to a contrary result.

C.

This case also brings into sharp focus the conflict between the circuits, and the issue twice left open by this Court, as to whether the Civil Rights Act is an "expressly authorized" exception to 28 U.S.C. § 2283. *Dombrowski* v. *Pfister*, 380 U.S. 479, 484 n. 2 (1965); *Cameron* v. *Johnson*, 381 U.S. 741 (1965). Compare, *Cooper* v. *Hutchinson*, 184 F. 2d 119 (3d Cir. 1950) and *Dilworth* v. *Reiner*, 343 F.2d 226 (5th Cir. 1965) with *Goss* v. *Illinois*, 312 F.2d

257 (7th Cir. 1963) and *Sexton* v. *Barry*, 233 F.2d 220 (6th Cir. 1956).

This issue, so critical to so many important litigations requires, and is now ripe for, resolution by this Court.

D.

Both courts below held that Dr. Stevens must await the outcome of the Pennsylvania litigation; that his rights could ultimately be vindicated by lengthy appeals through the Pennsylvania courts and, if necessary, to this Court. In so doing, the courts below failed to recognize the grave danger which the Pennsylvania action poses to free press and they failed to give effect to the guiding principles laid down by this Court in *Dombrowski, Button, Mills, Ashton,* among others, protecting the First Amendment from any activity which might have a "chilling effect" upon the free exercise of rights guaranteed by the Amendment.

This judicial abdication of responsibility in the guise of a wise exercise of the equitable doctrine of judicial abstention presents a compelling reason for review.

Conclusion

The Pennsylvania litigation has dragged on for more than two years. There were extensive pre-trial depositions, six days of trial and several oral arguments. Numerous briefs were submitted. The Pennsylvania action remains *sub judice* in the trial court. The petitioner is faced with the probability of several expensive and time-consuming appeals whatever the result in the Cumberland County Court of Common Pleas.

Since the ultimate and only relief sought in the state action is so clearly forbidden by the Constitution it follows that the state proceeding is but a charade. It is brought to harass and to punish Dr. Stevens; not with any real hope of success.

The mere pendency of the state action is a burden upon the free exercise of First Amendment rights; the suit must be defended, no matter how unmeritorious, and its existence inhibits distribution of Dr. Stevens' book. It creates a cloud over all historical writing.

The petition for a writ of certiorari should be granted.

April 5, 1967

Respectfully submitted,

SIMON H. RIFKIND
Attorney for Petitioner

JOSEPH H. EINSTEIN
IRA B. SHEPARD
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
of Counsel

APPENDIX A

Judgment of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

66–2287

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of February one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge,*
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG, *Circuit Judges.*

SYLVESTER K. STEVENS,
Plaintiff-Appellant,

v.

HELEN C. FRICK,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Appendix A

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

JUDGMENT ENTERED 2/24/67

JOHN J. OLEAR, JR.
Clerk

A true copy,

A. DANIEL FUSARO
Clerk

U. S. DISTRICT COURT
FILED
Feb 23 1967
S. D. OF N. Y.
J.J.O.

APPENDIX B

Opinion of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 261—September Term, 1966.

(Argued December 9, 1966 Decided February 1, 1967.)

Docket No. 30900

SYLVESTER K. STEVENS,

Plaintiff-Appellant,

v.

HELEN C. FRICK,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*,
HAYS and FEINBERG, *Circuit Judges*.

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge*, 259 F. Supp. 654 (1966), denying plaintiff's motion for a preliminary injunction and granting defendant's motion to dismiss the complaint in an action to enjoin defendant from further prosecuting a pending suit against plaintiff in the Court of Common Pleas of Cumberland County, Pennsylvania.

Affirmed.

Appendix B

SIMON H. RIFKIND, New York, New York (Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York; attorneys, Joseph H. Einstein and Ira B. Shepard, of counsel), *for Appellant.*

DAVID B. BUERGER, Pittsburgh, Pennsylvania (Millbank, Tweed, Hadley & McCloy, New York, New York, attorneys, William A. Jackson and A. Sidney Holderness, Jr., New York, N.Y., and James G. Park, James D. Morton and Buchanan, Ingersoll, Rodewald, Kyle & Buerger, Pittsburgh, Pennsylvania, of counsel), *for Appellee.*

HAYS, *Circuit Judge*:

Plaintiff, Sylvester K. Stevens, appeals from an order of the United States District Court for the Southern District of New York denying his motion for a preliminary injunction and granting the motion of defendant, Helen Clay Frick, to dismiss his complaint in an action to enjoin defendant Frick from prosecuting further a suit which she brought against plaintiff in the Court of Common Pleas of Cumberland County, Pennsylvania. The opinion of the district court is reported at 259 F. Supp. 654 (1966). We find that issuance of the injunction is precluded by the federal anti-injunction statute, 28 U. S. C. §2283, and therefore affirm the order of the district court.

There is no dispute as to the facts. In December 1964, Stevens, a historian and author, published a 400-page one volume general history of Pennsylvania entitled *Pennsylvania: Birthplace of a Nation.* Miss Frick apparently received a copy of the book as a 1964 Christmas gift. There were three references in the book to her deceased

father, Pennsylvania industrial magnate Henry Clay Frick, which Miss Frick believed were inaccurate and portrayed him unfairly. She wrote Stevens a letter of complaint. Later she commenced a suit in equity in the Court of Common Pleas of Cumberland County, Pennsylvania, alleging that the book contained false and defamatory statements about her father and seeking an injunction prohibiting Stevens from distributing or permitting others to distribute the book.[1]

Stevens answered the complaint on the merits and later moved to dismiss the Pennsylvania action on the ground that the injunction sought by Miss Frick would violate "the 1st and the 14th Amendments of the Federal Constitution . . . in that it violates the freedom of the press which is applicable to the State through the 14th Amendment and the cases thereto." The Pennsylvania court reserved decision on all substantive issues in the case, including this constitutional question[2] and its decision is still pending.[3] Stevens brought this action in the United States District Court for the Southern District of New York praying that Miss Frick be enjoined from prosecuting her Pennsylvania suit. He contends that the mere pendency of the Pennsylvania suit infringes his constitutional rights and obstructs distribution of his book. Plaintiff bases his claim to fed-

---

[1] Although the complaint in the Cumberland County action alleges that Miss Frick "has unjustly suffered and will continue to suffer a loss of reputation and public esteem," she seeks no money damages.

[2] The court made a ruling excluding secondary materials from evidence and, in general, limiting proof to eyewitness accounts and disinterested primary sources. Stevens contends that this ruling prejudices his defense to the action.

[3] The New York Times of January 12, 1967 reported that the Pennsylvania judge hearing the case had indicated that an opinion would probably be handed down within two months. N. Y. Times, Jan. 12, 1967, p. 43 col. 4.

eral jurisdiction on 28 U. S. C. §1343(3), (4),[4] conferring jurisdiction on the federal courts to hear actions brought under the Civil Rights Act of 1871, 42 U. S. C. §1983, and on 28 U. S. C. §1331,[5] defining the federal question jurisdiction of the federal courts.

The power of the federal courts to issue the injunction that Stevens seeks is narrowly limited by 28 U. S. C. §2283 which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Two principal grounds are advanced to support Stevens' contention that the statute is not a bar to the relief he seeks. It is argued first that Congressional authorization

---

[4] §1343. Civil Rights and Elective Franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

[5] §1331. Federal Question; Amount in Controversy; Costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

for the issuance of an injunction may be found in the Civil Rights Act of 1871, affording an injured party redress against any person who, "under color of any statute, ordinance, regulation, custom, or usage, of any State," has deprived him of his civil rights. 42 U. S. C. §1983; see 28 U. S. C. §1343(3). Secondly Stevens argues that Section 2283 establishes only a rule of comity and judicial discretion which must yield when necessary to preserve important constitutional rights.

I.

The Supreme Court has not decided whether the Civil Right Act creates an exception to the "anti-injunction" statute and empowers the federal courts to restrain pending state proceedings which violate rights protected by the Act. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 484 n. 2 (1965); *Cameron* v. *Johnson*, 381 U. S. 741 (1965). There is some conflict among those federal courts which have considered the issue. See authorities cited in *Studebaker Corp.* v. *Gittlin*, 360 F. 2d 692, 697 & n. 4 (2d Cir. 1966); *Baines* v. *City of Danville*, 337 F. 2d 579, 587-93 (4th Cir. 1964), cert. denied, 381 U. S. 939 (1965); Note, Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1051 (1965).

However, we find it unnecessary to pass on this question since Stevens has failed to show that he has a claim cognizable under the Civil Rights Act. "In cases under §1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States* v. *Price*, 383 U. S. 787, 794 n. 7 (1966) (citing cases); cf. *Douglas* v. *City of Jeannette*, 319 U. S. 157, 161-62 (1943). Such state action is lacking here.

Appendix B

Citing *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), Stevens argues that the requisite state action is present because Pennsylvania has provided a forum for the Frick lawsuit, he was served with process by a state officer, and he will be punished by the state if he violates any injunction which the state court may ultimately issue. While *Shelley* v. *Kraemer* does establish that the action of state courts may constitute state action for purposes of the Fourteenth Amendment and thus may give rise to a claim under the Civil Rights Act of 1871, the state judicial action involved in *Shelley* is readily distinguishable from that presented here. In *Shelley* the state courts, following a settled line of state decisions, had enforced racially restrictive covenants in deeds. The state had thus provided "the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners [were] willing and financially able to acquire and which the grantors [were] willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants [was] the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." 334 U. S. at 19.

By contrast, in this case no order or judgment has been entered under which the power of the state is invoked to suppress the Stevens book, nor is there any Pennsylvania statute or case which authorizes the imposition of unconstitutional restraints on freedom of the press. Indeed, the Pennsylvania constitution itself guarantees this freedom. Pa. Const., Art I, §7. Thus far Pennsylvania has merely provided a forum to determine the rights of the parties. Both logic and precedent suggest that merely by holding its courts open to litigation of complaints, regardless of how baseless they eventually prove to be, Pennsylvania

does not clothe persons who use its judicial processes with the authority of the state in the sense that Stevens suggests. See *Bottone* v. *Lindsley*, 170 F. 2d 705 (10th Cir. 1948), cert. denied, 336 U. S. 944 (1949); *Skolnick* v. *Martin*, 317 F. 2d 855, 857 (7th Cir.), cert. denied, 375 U. S. 908 (1963); *Skolnick* v. *Spolar*, 317 F. 2d 857 (7th Cir.), cert. denied, 375 U. S. 904 (1963).

II.

Stevens contends that even if he has not stated a claim under the Civil Rights Act, his complaint presents a federal question which the federal courts have jurisdiction to hear under 28 U. S. C. §1331. He argues that Section 2283 establishes only a rule of comity or judicial discretion and must yield in any case where the pendency of a state proceeding invades constitutional rights.

We do not believe that Section 2283 is so limited. See *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 348 U. S. 511, 514 (1955); *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, 132-34 (1941). But in any event considerations of comity weigh heavily against the issuance of an injunction in this case. The Pennsylvania action has been pending for over two years, a decision is apparently near. Stevens will have a right to appellate review after a judgment is entered and there is no reason to believe that the Pennsylvania courts, and if necessary the United States Supreme Court, cannot or will not protect his constitutional rights. See *Douglas* v. *City of Jeannette*, *supra*, 319 U. S. at 165; cf. *City of Greenwood* v. *Peacock*, 384 U. S. 808, 828 (1966); Comment, 65 Colum. L. Rev. 647, 648-51 (1965).

Stevens has failed to show that the mere pendency of the Frick lawsuit is causing him irreparable injury by

"seriously inhibiting the exercise of protected freedoms." *Dombrowski* v. *Pfister, supra,* 380 U. S. at 489. There is no evidence of any interference with Stevens' rights, with the distribution of his book or with the public's right to read. Indeed, there is no indication that the pendency of the Frick suit has had any greater effect on First Amendment rights than would the pendency of a constitutionally permissible libel action.[6] In the *Dombrowski* case, on which Stevens relies, there was a pattern of official harassment, arrests and threatened prosecutions under an overly broad criminal statute which constituted a serious interference with the exercise of First Amendment rights. The pendency of Miss Frick's civil action in Pennsylvania presents an entirely different situation.

The order denying a preliminary injunction and dismissing the complaint is affirmed.

---

[6] We do not mean to express any opinion as to the constitutionality of the injunction which Miss Frick seeks in Pennsylvania.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 8 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1247

SYLVESTER K. STEVENS, Petitioner,

v.

HELEN C. FRICK, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID B. BUERGER
JAMES G. PARK
JAMES D. MORTON
1800 Oliver Building
Pittsburgh, Pennsylvania 15222
Attorneys for Respondent

BUCHANAN, INGERSOLL, RODEWALD, KYLE & BUERGER
WILLIAM E. JACKSON
A. SIDNEY HOLDERNESS
MILBANK, TWEED, HADLEY & MCCLOY
Of Counsel

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX TO BRIEF

	PAGE
Questions Presented	1
Statement of the Case	2
Argument	6
I. Petitioner's Rights Have Not Been Affected In Any Way By the Pennsylvania Action.	6
II. Federal Courts Should Not Interfere With State Court Proceedings Unless It Is Clear That the State Court Will Disregard the Constitution.	7
III. Petitioner's Arguments Answered	9
A. The Petition should be denied under 28 U. S. C. § 2283 and also because of the long-standing policy that a federal court will not enjoin state court proceedings involving private citizens.	9
B. Providing a forum for a trial of a private action does not constitute "state action".	13
C. The question whether the Civil Rights Act is an exception to 28 U. S. C. § 2283 is not present in this case	14
D. The Pennsylvania action has not affected any of Petitioner's constitutional rights.	14
Conclusion	15

TABLE OF CITATIONS

CASES PAGE

Beauharnais v. Illinois, 343 U.S. 250 13

Betmar Hats v. Young America Hats, 116 F.2d 956 (2d Cir. 1941) 12

Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948), cert. denied, 336 U.S. 944 13

Cameron v. Johnson, 381 U.S. 741 ..... 10, 11

Carpenters Union v. Ritter's Cafe, 315 U.S. 722 12

Clothing Workers v. Richman Bros., 348 U.S. 511 .. 9

Dombrowski v. Pfister, 380 U.S. 479 ..... 8, 11, 12

Donovan v. City of Dallas, 377 U.S. 408 10

Douglas v. City of Jeannette, 319 U.S. 157 11

Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374 12

Georgia v. Rachel, 384 U.S. 780 ..... 7, 8

Giles v. Maryland, 35LW4181, 4185 ..... 7, 10

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 6

Greenwood v. Peacock, 384 U.S. 808 ..... 7, 11, 15

Kingsley Books, Inc. v. Brown, 354 U.S. 436 12

Linn v. Plant Guard Workers, 383 U.S. 53 13

Murray Space Shoe Corp. v. Federal Trade Commission, 304 F.2d 270 (2d Cir. 1962) 12

Near v. Minnesota, 283 U.S. 697 12

Roth v. United States, 354 U.S. 476 13

Skolnick v. Martin, 317 F.2d 855 (7th Cir. 1963), cert. denied, 375 U.S. 908 13

Skolnick v. Spolar, 317 F.2d 857 (7th Cir. 1963), cert. denied, 375 U.S. 904 13

Table of Citations.

CASES	PAGE
Spahn v. Julian Messner, Inc., 18 N.Y. 2d 324, 221 N.E.2d 543 (1966)	12
Stefanelli v. Minard, 342 U.S. 117	11
Toucey v. New York Life Ins. Co., 314 U.S. 118	9
Wilson v. Schnettler, 365 U.S. 381	10

CONSTITUTION AND STATUTES

U. S. Constitution, First Amendment	2, 6, 8, 14, 15
U. S. Constitution, Fourteenth Amendment	2
28 U.S.C. § 2283	9, 10, 13, 14
42 U.S.C. § 1983 (Civil Rights Act of 1871)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1247

SYLVESTER K. STEVENS, Petitioner,

v.

HELEN C. FRICK, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Should a writ of certiorari be granted in a case which seeks to enjoin proceedings between two private citizens in a Pennsylvania court where there neither has been nor can be any deprivation of the petitioner's rights by the Pennsylvania court?

2. Should a writ of certiorari be granted in a case which seeks to enjoin proceedings between two private citizens in a Pennsylvania court where the same constitutional questions petitioner seeks to raise in the federal courts are now pending before the Pennsylvania court?

3. Should a writ of certiorari be granted in a case which seeks under the Civil Rights Act of 1871 to enjoin a Pennsylvania court where there has been no state action?

STATEMENT OF THE CASE

Since January, 1965, a non-jury action has been pending in the Court of Common Pleas of Cumberland County, Pennsylvania between two private residents of Pennsylvania. One of the questions in that suit is whether certain statements made by the defendant in that case, who is the petitioner here, are false, defamatory, and malicious. The defendant there asserted that the statements were true and also argued that, even if his statements are false, defamatory, and malicious, the action contravenes the First and Fourteenth Amendments to the United States Constitution. All of the testimony has been taken, the evidence ruled upon, the parties have submitted their respective requests for findings of fact and conclusions of law, argument thereon has been had, and the sole matter remaining is the decision of the Judge. The defendant by this proceeding is asking this Court to halt the Pennsylvania action (Petition, p. 8)*

Respondent, Miss Helen C. Frick, is a resident of Allegheny County, Pennsylvania, and petitioner, Sylvester K. Stevens, is a resident of Cumberland County, Pennsylvania (15a). In December, 1964, he published a book written by him entitled "Pennsylvania—Birthplace of a Nation", and had it sold and circulated throughout Pennsylvania and elsewhere (13a). The book contained statements about Henry Clay Frick, late father of Miss Frick (17a-18a).

---

*All record references in the form of page numbers followed by "a" are to the Court of Appeals Appendix. Those references to the Petition for Writ of Certiorari are "Petition, p. . . ."

Statement of the Case.

On January 19, 1965, Miss Frick commenced an action in equity against petitioner in the Court of Common Pleas of Cumberland County, Pennsylvania (13a). In this action she alleged that the statements about her father were false, defamatory, malicious, and hence libelous (17a-19a). She further alleged that she had devoted her life to honoring the memory of her father, so that she had become specially associated with the memory of her father in the mind of the public, and that the libelous statements against her father thus tended to lower her in the mind of the community (16a). Because of these facts, she alleged that she in her own right had been injured by the libelous statements in that she had unjustly suffered a loss of reputation and public esteem (19a). If the Pennsylvania court finds that the statements are false and defamatory, Miss Frick has requested that repetition of them be restrained by enjoining further distribution of the book or that the Court grant such other relief as may be deemed necessary and proper (20a).

On February 25, 1965, petitioner filed an answer in which he admitted publishing the statements, but claimed that the statements were true (24a). In addition, petitioner has raised in the Pennsylvania case the same constitutional questions which are raised in this proceeding (25a), Petition, p. 10.

After pre-trial discovery by both parties, a pre-trial conference was held on June 11, 1965, at which petitioner agreed that certain statements in his book were erroneous and agreed to retract them (24a). The case then proceeded to trial on the truth or falsity of the other challenged statements and testimony was taken at

Carlisle, Pennsylvania, before Hon. Clinton R. Weidner, Judge of the Court of Common Pleas of Cumberland County, on six days during June, August and November, 1965 (24a).

On March 1, 1966, the Pennsylvania Court received briefs and heard oral argument relating to the admissibility of certain evidence (25a). On July 13, 1966, the Court issued its ruling on these evidentiary matters (25a).

On October 12, 1966, petitioner filed in the Pennsylvania Court requests for findings of fact and conclusions of law, together with a brief. He devoted 40 pages to arguments on his alleged constitutional right to publish false and defamatory statements, and 109 pages to arguments that the statements were not false and defamatory.

On January 10, 1967, the Pennsylvania Court heard oral argument on the requested findings of fact and conclusions of law, at which time petitioner's attorney argued the same constitutional questions presented in this proceeding. The matter is now under consideration and the only thing remaining in the Pennsylvania action is the Judge's decision.

Since the Pennsylvania suit was instituted, petitioner not only has continued to sell his book with 10,000 copies in circulation and an additional 4000 more available, but a new paperback edition has been prepared and distributed by him, with 1000 copies of the new paperback in circulation and some 2000 available to fill expected orders. (39a)

Statement of the Case.

On July 26, 1966, about 18 months after the Pennsylvania suit had been instituted and seven months after all testimony had been taken, petitioner filed the complaint in this action against Miss Frick in the Southern District of New York, seeking to enjoin her from further prosecution of the Pennsylvania action (1a). He asserted that the Pennsylvania proceeding violated his rights under the United States Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983, (13a). On August 12, 1966, Miss Frick moved to dismiss this action. Petitioner cross-moved for a preliminary injunction (28a). The District Court on October 17, 1966, granted the motion to dismiss and denied the motion for an injunction: 259 F. Supp. 654. This decision was affirmed by the Court of Appeals for the Second Circuit on February 1, 1967: 372 F.2d 378. Petitioner filed his petition for review on April 10, 1967.

ARGUMENT

I. Petitioner's Rights Have Not Been Affected In Any Way By The Pennsylvania Action.

Contrary to petitioner's assertion that his "sensitive First Amendment" rights are being put in jeopardy and their exercise immediately obstructed by a state court," (Petition, p. 6), petitioner's rights have not been affected in any way by the Pennsylvania action. During the time that suit has been pending, petitioner has continued to distribute and sell his book. In addition, he has even printed, distributed and sold a new paperback edition (39a). There has been no deprivation of any of petitioner's rights. The Circuit Court held (Petition, p. 32):

> ". . . There is no evidence of any interference with Stevens' rights, with the distribution of his book or with the public's right to read."

The District Court held:

> "As indicated heretofore, the 'mere pendency' of the Pennsylvania action has not demonstrably impaired Dr. Stevens' constitutional rights, the sale of his book or the public's right to read." (11a)

Petitioner's unsupported assertion that his rights are being affected cannot survive the "concurrent findings of fact" by two courts below: *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275.

II. Federal Courts Should Not Interfere With State Court Proceedings Unless It Is Clear That The State Courts Will Disregard The Constitution.

The most compelling reason for denying the petition is the fact that the very same constitutional questions are now pending before the Pennsylvania Court. This Court has very recently held "that the state courts should have the opportunity to decide in the first instance is a course consistent with comity": *Giles v. Maryland,* 35LW4181, 4185. The same case reiterated the long-established rule that "in the light of the relations existing . . . between the judicial tribunals of the Union and States . . . that those relations not be disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

This principle is particularly applicable since petitioner has not demonstrated that "the state trial court will find the defendant guilty if he is innocent": *Greenwood v. Peacock,* 384 U.S. 808, 827. Petitioner is asking this Court to engage in "the unseemly process of prejudging their brethren of the state courts." *Georgia v. Rachel,* 384 U.S. 780, 803. This Court should not be asked to do so. Surely, if "[T]he civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial," an original action under the Civil Rights Act cannot do so when there is no evidence that the state court will not protect those rights. See, *Greenwood v. Peacock,* 384, U.S. 808, 828. The Civil Rights Act was never intended "to work a wholesale disloca-

tion of the historic relationship between the state and federal courts" in the administration of civil or criminal cases. Ibid, p. 831.

The question here is not the protection of First Amendment rights because there has been no interference with those rights. On the contrary, the question is whether in the absence of the slightest evidence that a state court will disregard the United States Constitution or that it will endeavor to enforce a law which on its face is clearly illegal, such as in *Georgia v. Rachel,* 384 U.S. 780, 803, and *Dombrowski v. Pfister,* 380 U.S. 479, this Court or any federal court should disrupt the delicate balance between federal and state courts by removing from the state court its right to determine constitutional issues arising in a suit between private parties.

Georgia v. Rachel, 384 U.S. 780, 800, rules that the federal courts are to supersede state tribunals "only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts." Of course, in the Pennsylvania action the respondent denies that petitioner has any federal rights which might be infringed. But if petitioner does there have the federal rights he claims, there is no reason to believe that the Pennsylvania courts will disregard those rights. Certainly, Pennsylvania has no "law of general application" to stand in his way.

III. Petitioner's Arguments Answered.

Petitioner's arguments are enumerated A through D and the following are specific replies thereto.

A. THE PETITION SHOULD BE DENIED UNDER 28 U.S.C. § 2283 AND ALSO BECAUSE OF THE LONG-STANDING POLICY THAT A FEDERAL COURT WILL NOT ENJOIN STATE COURT PROCEEDINGS INVOLVING PRIVATE CITIZENS.

Petitioner argues that 28 U.S.C. § 2283 is not a bar to his federal court proceedings. (Petition, p. 16) However, this Court in *Clothing Workers v. Richman Bros.*, 348 U.S. 511, held (pp. 514, 516):

> "We need not re-examine the series of decisions, prior to the enactment of Title 28 of the United States Code in 1948, which appeared to recognize implied exceptions to the historic prohibition against federal interference with state judicial proceedings. See, *Toucey v. New York Life Ins. Co.*, 314 U.S. 118. By that enactment, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation."
>
> * * * * * * *
>
> ". . . This (28 U.S.C. § 2283) is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically denied exceptions."

If, as petitioner asserts, a federal court can enjoin state proceedings as a matter of judicial discretion, then there would have been no need to remand to the

district court in *Cameron v. Johnson,* 381 U.S. 741, to have it "consider whether 28 U.S.C. § 2283 bars a federal injunction in this case," i.e., whether the Civil Rights Act is an exception to § 2283.

Petitioner asks that § 2283 be ignored or that a new exception be added thereto by "applying the judge-made rule of comity." (Petition, p. 16) However, this Court does not desire a conflict with state court proceedings. *Giles v. Maryland,* 35LW4181, 4185. *Donovan v. City of Dallas,* 377 U.S. 408, held (p. 412):

> "Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. . . ."

Footnote 4 of *Wilson v. Schnettler,* 365 U.S. 381, 384, points out:

> "It is a doctrine of law too long established to require a citation of authorities, that . . . where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. *Peck v. Jenness,* supra, at 624-625."

As a matter of policy, this Court has always been reluctant to interfere with pending state court proceed-

ings: *Stefanelli v. Minard,* 342 U.S. 117; *Douglas v. City of Jeannette,* 319 U.S. 157. The questions of policy which were prevailing in *Greenwood v. Peacock,* 384 U.S. 808, 832-834, are equally applicable to this case. If, in every case in a state court between private citizens wherein a constitutional question is raised, the defendant would have the right to go to a federal court to enjoin the state proceedings, there would be a "phenomenal increase" in federal proceedings (p. 832); a trial may not be had until "months or years after the original charge was brought" (p. 833); and undoubtedly "many hundreds of new federal judges and other federal court personnel would have to be added in order to cope with the vastly increased case load that would be produced" (p. 834). Surely, "the historic practice" of holding state trials in state courts even where constitutional questions are present has not been "such a failure that the relationship should now be revolutionized." (p. 834)

However, even if a federal court could intercede in state court proceedings, this case does not present a situation which requires such action or one in which this Court should grant the petition. The guidelines for intervention set forth in *Dombrowski v. Pfister,* 380 U.S. 479, and approved in *Cameron v. Johnson,* 381 U.S. 741, are: (1) the state action was not brought in good faith (evidenced in the *Dombrowski* case by a pattern of repeated arrests and threatened prosecutions), or (2) the statute was unconstitutional on its face. Neither of these criteria is present. In fact, both the district court and circuit court held that even under *Dombrowski,* the facts in this case did not warrant action by the federal courts.

Petitioner apparently believes the Pennsylvania court cannot properly adjudicate the constitutional questions; but this unsupported belief is no basis for federal intervention. *Dombrowski v. Pfister,* 380 U.S. 479, held (pp. 484-485):

> ". . . it is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will not usually amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

Petitioner assumes that even if the Pennsylvania court finds that his statements are false and defamatory, it cannot grant any relief such as prohibiting their republication. Unlike *Near v. Minnesota,* 283 U.S. 697, which involved a prior restraint on publication, the Pennsylvania action asks restraint only if the Court determines the statements are false and defamatory. There are numerous cases wherein the publication of false statements has been enjoined: *Federal Trade Commission v. Colgate-Palmolive Co.,* 380 U.S. 374; *Carpenters Union v. Ritter's Cafe,* 315 U.S. 722; *Murray Space Shoe Corp. v. Federal Trade Commission,* 304 F.2d 270 (2d Cir. 1962); *Betmar Hats v. Young America Hats,* 116 F.2d 956 (2d Cir. 1941); *Spahn v. Julian Messner, Inc.,* 18 N.Y. 2d 324, 221 N.E. 2d 543 (1966). If the publication of merely false statements can be enjoined, statements can enjoy no greater constitutional protection when, besides being false, they are also defamatory.

Likewise, a restraint on obscenity was upheld in *Kingsley Books, Inc. v Brown,* 354 U.S. 436. So, if the

publication of obscene material can be enjoined, then the false and defamatory should be subject to subsequent restraint because surely libelous statements do not enjoy any greater constitutional protection. In fact, they may enjoy less protection: *Linn v. Plant Guard Workers,* 383 U.S. 53, 63 (". . . malicious libel enjoys *no* constitutional protection in *any* context"); *Roth v. United States,* 354 U.S. 476; *Beauharnais v. Illionois,* 343 U.S. 250. Simply because petitioner's statements would be constitutionally protected if they are not libelous is no reason to forbid the Pennsylvania court to determine whether they are libelous. This is particularly true when the alleged constitutional issue is squarely before the Pennsylvania court.

Since the very constitutional issues raised by petitioner are pending in the Pennsylvania case, in which a decision is imminent, there is no need for this Court to grant the petition, particularly in view of 28 U.S.C. § 2283 and under the principles and policy that the federal courts should not enjoin state court proceedings.

B. PROVIDING A FORUM FOR A TRIAL OF A PRIVATE ACTION DOES NOT CONSTITUTE "STATE ACTION".

To date, all that Pennsylvania has done is to provide a forum wherein two of its citizens in a private lawsuit may have their rights adjudicated. This does not constitute "state action": *Bottone v. Lindsley,* 170 F.2d 705 (10th Cir. 1948), cert. denied, 336 U.S. 944; *Skolnick v. Martin,* 317 F.2d 855 (7th Cir. 1963), cert. denied, 375 U.S. 908; *Skolnick v. Spolar,* 317 F.2d 857 (7th Cir. 1963), cert denied, 375 U.S. 904. To hold otherwise would mean that in every private lawsuit wherein constitutional questions are raised, a proceedings under

the Civil Rights Act could be instituted in federal court to enjoin the state court action. As pointed out above, such procedure is not only contrary to law but repudiates the long-established policy of non-intervention by federal courts in state court actions.

C. The queston whether the Civil Rights Act is an exception to 28 U.S.C. § 2283 is not present in this case.

Neither the District Court (10a-12a) nor the Circuit Court (Petition, p. 29) passed on the question whether the Civil Rights Act is an exception to 28 U.S.C. § 2283. Hence, this question is not before the Court. This Court has long refrained from passing on constitutional questions which were not decided by the court below.

D. The Pennsylvania action has not affected any of petitioner's constitutional rights.

Petitioner argues that the mere pendency of the state action is a burden upon the exercise of First Amendment rights (Petition, p. 21) and it has a "chilling effect" on these rights (Petition, p. 20). But petitioner admits that his book is still being sold, and that it has been sold continually, together with a new paperback edition, during the 28 months since the Pennsylvania action began. (39a) Hence, it has had no effect on his First Amendment rights. Both the district and circuit courts held that the Pennsylvania action had not affected petitioner's constitutional rights. Certainly, a mere request that if a court finds the utterances to be libelous, that further publication of them be enjoined, has less chilling effect than a suit for damages or a criminal prosecution for libel.

CONCLUSION

There is no evidence that petitioner's First Amendment rights have been invaded by the pendency of the Pennsylvania action. There has been no showing or reason to believe that the Pennsylvania court will disregard his rights under the First Amendment. There is no "state action" required by the Civil Rights Act. In the event that petitioner's ideas of constitutional law are not approved by the Pennsylvania trial or appellate courts, then he can appeal to this Court, which is the most obvious and traditional remedy for redress of wrongs by state courts: *Greenwood v. Peacock*, 384 U.S. 808, 828. For all of these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID B. BUERGER
JAMES G. PARK
JAMES D. MORTON
Attorneys for Respondent

May 5, 1967.

BUCHANAN, INGERSOLL, RODEWALD,
KYLE & BUERGER

WILLIAM E. JACKSON
A. SIDNEY HOLDERNESS
MILBANK, TWEED, HADLEY & MCCLOY

Of Counsel